

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ROBERT KENNY,

Plaintiff,

v.

PACIFIC INVESTMENT MANAGEMENT
COMPANY LLC; PIMCO INVESTMENTS
LLC.,

Defendant.

No. 2:14-cv-01987-RSM

STIPULATION AND ORDER RE:
INDEPENDENT TRUSTEE
DISCOVERY

WHEREAS, on December 31, 2014, Plaintiff Robert Kenny (“Plaintiff”) filed the Complaint in this action, Dkt. # 1, asserting claims against Defendants Pacific Investment Management Company LLC and PIMCO Investments LLC (collectively “PIMCO”) for alleged violations of Section 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-36(b) (“ICA”); and

WHEREAS, on August 26, 2015, the Court denied Defendants’ Motion to Dismiss the Complaint, Dkt. # 45; and

WHEREAS, on November 30, 2015, Plaintiff issued non-party document subpoenas to certain Trustees of PIMCO Funds, a Massachusetts business trust, (hereinafter the “Independent

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(Case No. 2:14-cv-01987-RSM) -1

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Trustees”),¹ and, on December 14, 2015, the Independent Trustees asserted the attorney-client privilege and objected to producing any documents subject to that privilege in response to those subpoenas; and

WHEREAS, Plaintiff has not disputed that the Independent Trustees asserted their claim of attorney-client privilege over such documents within the time allowed under Fed. R. Civ. P. 45; and

WHEREAS, Plaintiff’s Second Motion to Compel did not ask the Court to determine, nor did the Court determine, whether or not any documents meet the requirements for invoking the attorney-client privilege, and Plaintiff has not waived his right to challenge whether the Documents meet the requirements for invoking the attorney-client privilege;² and

WHEREAS, on November 21, 2016, the Court granted Plaintiff’s Second Motion to Compel (“Order”), Dkt. # 140, holding, in this “issue of first impression,” that the Independent Trustees must produce to Plaintiff: (a) unredacted versions of the documents listed in Exhibit 1 to the Lin Declaration, Dkt. # 101-1; and (b) all of the withheld documents listed in the Trustees’ Amended Privilege Log, Dkt. No. # 101-3 (the “Documents”); and

WHEREAS, the Court held that “[n]othing in this Order requires public disclosure of the requested materials,” Dkt. # 140 at 9; and

¹ The subpoenas that are the subject of this Stipulation were issued to George Borst, E. Philip Cannon, Jennifer Dunbar, J. Michael Hagan, Gary Kennedy, Peter McCarthy, Ronald Parker and William Popejoy, each of whom is identified as an “Independent Trustee” in SEC filings concerning the PIMCO Funds and is presumed to be independent pursuant to the Investment Company Act of 1940. 15 U.S.C. § 80a-2(a)(9). The use of the term in this Stipulation is not a concession by Plaintiff that the trustees are, in fact, independent and this Stipulation does not waive the ability of any party to present evidence concerning the independence, or lack thereof, of any trustee(s).

² Any reference to Documents or Testimony herein as being protected by the attorney-client privilege refers to the Independent Trustees’ assertion of the privilege and is not a concession by Plaintiff that the requirements for invoking the privilege are met in each instance, nor does it waive Plaintiff’s ability to challenge such assertions pursuant to Paragraphs 9-10 of this Stipulation.

1 WHEREAS, Plaintiff may now review the Documents pursuant to the Order, and assess
2 whether the requirements for invoking the attorney-client privilege are met in each instance;

3 WHEREAS, Plaintiff's Second Motion to Compel did not seek to compel, nor does the
4 Order compel, the Independent Trustees to provide Plaintiff with testimony about
5 communications between the Independent Trustees and Dechert LLP that are protected by the
6 attorney-client privilege ("Testimony"), but Plaintiff and the Independent Trustees acknowledge
7 that the Order's holding nonetheless bears upon Testimony that Plaintiff may seek in the
8 litigation; and
9

10 WHEREAS, Plaintiff's Second Motion to Compel did not seek to compel, nor does the
11 Order compel, the production of documents or testimony from William Popejoy to Plaintiff, but
12 Plaintiff and the Independent Trustees acknowledge that the Order's holding nonetheless bears
13 upon the disclosure to Plaintiff of certain communications to or from Mr. Popejoy, in his former
14 capacity as an Independent Trustee, that were withheld as protected by the attorney-client
15 privilege; and
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17 WHEREAS, following issuance of the Order, counsel for Plaintiff and the Independent
18 Trustees met and conferred in a good faith attempt to (i) avoid the cost and delay of any possible
19 appeal of the Order, (ii) reach agreement on the terms of compliance with the Order, (iii) resolve
20 other discovery issues pertaining to documents and testimony that the Independent Trustees
21 withheld or might later withhold as protected by the attorney-client privilege, and (iv) avert the
22 need for future Court intervention, all in an effort to avoid adversely impacting the timely
23 conduct of the litigation;
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25 NOW, THEREFORE, PLAINTIFF AND THE INDEPENDENT TRUSTEES HEREBY
26 STIPULATE AND AGREE, as follows:

STIPULATION AND ORDER RE:
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1 1. The Order requires the Independent Trustees to produce to Plaintiff the
2 Documents solely in Plaintiff's capacity as a beneficiary of PIMCO Funds, a Massachusetts
3 business trust, who also is pursuing a claim on behalf of the PIMCO Total Return Fund under
4 Section 36(b) of the ICA that has progressed past the pleadings stage and into discovery.

5 2. The Independent Trustees' compliance with the Order does not operate to
6 eliminate or waive the protection of the attorney-client privilege, where applicable, to
7 communications between the Independent Trustees and their counsel retained in accordance with
8 the provisions of the ICA.

9 3. Pursuant to Federal Rules of Evidence 502(d) & (e), the Independent Trustees do
10 not waive the attorney-client privilege, where applicable, over any Documents and/or Testimony
11 by sharing such materials with Plaintiff in this litigation pursuant to the Order. The Independent
12 Trustees therefore may continue to assert the attorney-client privilege, where applicable, to
13 prevent disclosure of the Documents and Testimony at issue in this or any other proceeding
14 against any person or entity other than Plaintiff in this litigation, including against PIMCO.

15 4. If any Independent Trustee asserts the attorney-client privilege during his or her
16 deposition in response to any question, counsel to the Independent Trustees, counsel to Plaintiff
17 and counsel to PIMCO shall consult regarding whether the responsive testimony would divulge
18 communications that, if privileged, fall within the "fiduciary exception" as recognized in the
19 Order.

20 5. If, following such consultation, counsel to the Independent Trustees maintains
21 that the responsive testimony would divulge privileged communications that fall outside the
22 "fiduciary exception" as recognized in the Order, the deposition will proceed in the ordinary
23 course with (i) Plaintiff and PIMCO reserving their respective rights to challenge whether the
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1 requirements for invoking the privilege are met, and (ii) Plaintiff reserving its right to challenge
2 that such testimony would fall outside the “fiduciary exception” as recognized in the Order;

3 6. Alternatively, if, following such consultation, counsel to the Independent Trustees
4 maintains that the responsive testimony would divulge privileged communications that fall
5 within the “fiduciary exception” as recognized in the Order, the following procedure shall apply:
6

7 a) Anyone other than the Independent Trustee, his or her counsel, the court reporter,
8 the videographer, and counsel for Plaintiff shall leave the room;

9 b) The Independent Trustee shall provide the responsive testimony to counsel for
10 Plaintiff in accordance with the Order;

11 c) That portion of the deposition transcript shall be sealed and only made available
12 to the Independent Trustee, his or her counsel, the court reporter, the videographer, and counsel
13 for Plaintiff; and
14

15 d) Disclosure of any such Testimony in this litigation to any person or entity other
16 than Plaintiff shall only be allowed as set forth in Paragraphs 7-11, *infra*.

17 7. Plaintiff shall not disclose any Documents or Testimony absent agreement with
18 the Independent Trustees or further order of this Court except that Plaintiff and the Independent
19 Trustees shall be permitted to disclose Documents or Testimony to an expert witness for the
20 limited purpose of consulting about whether any Document or Testimony is subject to the
21 attorney-client privilege or the necessity of disclosing any of the content of any Document or
22 Testimony notwithstanding the attorney-client privilege. Disclosure to any retained expert
23 witness shall comply with the Amended Stipulated Protective Order referenced in Paragraph 11,
24 *infra*.
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1 8. If Plaintiff and the Independent Trustees disagree about whether any document,
2 testimony, or portion of a document or testimony meets the requirements for invoking the
3 attorney-client privilege, the procedure set forth in Paragraphs 9-10, *infra*, shall apply.

4 9. In the event that Plaintiff reasonably believes it is necessary for any of the
5 Documents (or portion(s) thereof) or Testimony to be disclosed for use in connection with this
6 litigation notwithstanding the attorney-client privilege or challenges whether the requirements
7 for invoking the attorney-client privilege over any Document (or portion(s) thereof) or
8 Testimony are met: (a) Plaintiff shall notify counsel for the Independent Trustees in writing of
9 the Document(s) (or portion(s) thereof) or Testimony Plaintiff believes should be disclosed
10 notwithstanding the Independent Trustees' assertion of the attorney-client privilege, or of
11 Plaintiff's intent to challenge the attorney-client privilege designation, as well as the reasons
12 supporting Plaintiff's position; and (b) within seven days of such notification, Plaintiff and the
13 Independent Trustees shall meet and confer in a good faith attempt to reach agreement regarding
14 either withdrawal of the claim of privilege over such material or waiver of the attorney-client
15 privilege solely to the extent necessary to permit disclosure. If Plaintiff and the Independent
16 Trustees reach agreement to allow disclosure, the Documents and/or Testimony at issue shall be
17 disclosed in this litigation only on such terms as agreed to by Plaintiff and the Independent
18 Trustees.
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21 10. If Plaintiff and the Independent Trustees cannot reach agreement, the Independent
22 Trustees shall submit the dispute to the Court by means of a motion for a protective order
23 pursuant to Federal Rule of Civil Procedure 26(c) and Local Rule 26(c). Such motion shall be
24 filed and noted either in the manner prescribed by Local Rule 7(d)(3) within seven days of
25 reaching an impasse, or, by agreement, the expedited procedure set forth in Local Rule 37(a)(2),
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1 with the Independent Trustees providing Plaintiff with a draft of the LCR 37 submission within
 2 five days of reaching an impasse. Plaintiff and the Independent Trustees will confine their
 3 briefing to the following issues: (1) whether the communications at issue meet the requirements
 4 for protection of the attorney-client privilege and/or whether the privilege has been waived
 5 and/or abrogated for reasons other than compliance with the Order; (2) whether Plaintiff may
 6 disclose communications between the Independent Trustees and their counsel that are subject to
 7 the attorney-client privilege; (3) the appropriate standard for deciding these issues; and/or (4) the
 8 appropriate relief.
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10 11. In the event any of the Documents or Testimony are disclosed in this litigation
 11 pursuant to agreement between the Plaintiff and the Independent Trustees or further order of this
 12 Court, such material shall be designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES
 13 ONLY,” as appropriate, pursuant to the terms of the Amended Stipulated Protective Order that
 14 has been submitted to the Court concurrent with this stipulation.
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16 12. If the Stipulation is entered in the form jointly submitted to the Court by Plaintiff
 17 and the Independent Trustees, the Independent Trustees agree not to appeal the Order or pursue
 18 any other collateral challenge to the Order.
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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated this 15th day of February, 2017.

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By: s/ Tana Lin

By: s/ Laura R. Gerber

By: s/ Ian Mensher

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5 *Attorneys for Plaintiff*

6 PURSUANT TO STIPULATION, IT IS SO ORDERED this 22 day of February 2017.
7 OrderSig

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9 RICARDO S. MARTINEZ
10 CHIEF UNITED STATES DISTRICT JUDGE
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STIPULATION AND ORDER RE:
INDEPENDENT TRUSTEE
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